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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ANITA G. CHESLEY,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

A151934

(Alameda County
Super. Ct. No. RG14-716082)

Defendant Wells Fargo Bank, N.A. (Wells Fargo) was granted summary judgment in the foreclosure case brought against it by plaintiff Anita Chesley (Chesley). Five months later, Chesley moved the trial court for discretionary relief from the judgment under Code of Civil Procedure section 473, subdivision (b)¹ based on alleged abandonment by her attorney in the form of an inadequate opposition to Wells Fargo's summary judgment motion. The motion was denied for following reasons: (1) Chesley failed to act with diligence in bringing the motion; (2) Chesley did not file proposed pleadings in opposition to the summary judgment motion or otherwise sufficiently demonstrate how a different opposition would have altered the outcome; and (3) Chesley did not demonstrate a basis for relief. We affirm.

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated. References to "section 473(b)" are to section 473, subdivision (b).

FACTUAL AND PROCEDURAL BACKGROUND

Chesley's Wrongful Foreclosure Lawsuit

Chesley is the former owner of, and resided in, a multi-unit property located in Oakland, California (the property). Chesley purchased the property in late 2005 with a loan from World Savings Bank, FSB (the loan). In 2006, Wells Fargo became the successor in interest on the loan. In 2010, Chesley became delinquent in her monthly mortgage payments. Wells Fargo's trustee recorded a notice of default in late 2012 and, in late 2013, sold the home in foreclosure to RWW Properties LLC (RWW). RWW brought an unlawful detainer action against Chesley in order to obtain possession of the property and was awarded summary judgment in April 2014.

In March 2014, Chesley filed her original wrongful foreclosure complaint. After multiple demurrers, Chesley filed a third amended complaint (TAC) against Wells Fargo, and Wells Fargo again demurred.² In March 2015, the trial court overruled the demurrer to the causes of actions for fraud, breach of contract, breach of the implied duty of good faith and fair dealing, and Business and Professions Code section 17200, et seq. The trial court sustained the demurrer, without leave to amend, as to the causes of action for intentional infliction of emotional distress, and wrongful foreclosure, and granted Wells Fargo's motion to strike certain damage claims. Wells Fargo answered the TAC in May 2015.

In December 2015, Chesley filed a substitution of attorney to replace her prior counsel with attorney Julie Cliff (Cliff).

Wells Fargo's Motion for Summary Judgment and Withdrawal of Chesley's Counsel

In March 2016, Wells Fargo moved for summary judgment, averring that Chesley defaulted on her mortgage, that the property was sold to a third party in a valid foreclosure sale, and that none of her challenges to the foreclosure had any merit.

² Wells Fargo is the sole defendant in the TAC.

As alleged in the declaration of Chesley's daughter, Catalina Chesley (Catalina),³ in support of the motion to set aside judgment discussed below, in March and April 2016 Catalina contacted Cliff regarding documents she "believed showed the defendant Wells' fraudulent scheme." Cliff assured her the documents would be filed in opposition to the summary judgment motion and, once the motion was defeated, Cliff would file an amended complaint to include the new information as well as a motion to compel the production of additional documents. On May 11, Catalina sent an email to Cliff confirming "[Cliff's] request to not continue representing us is because we are behind in our payment for your services" and the arrears would be paid "as soon as we can"; meanwhile, Cliff would be filing a "vigorous" opposition to the summary judgment motion while Chesley and Catalina would "be looking for an attorney to substitute [Cliff] in the case as soon as possible."

On May 12, Cliff served the opposition to the motion for summary judgment, including a 15-page memorandum of points and authorities, Chesley's declaration, Cliff's declaration, and a separate statement of undisputed facts. The opposition included a request for a continuance to allow for the deposition of certain Wells Fargo representatives because "[m]any facts were uncovered and many questions raised in Wells Fargo Bank's document production of March 2016, and Plaintiff has not had the resources to complete these depositions in the short time remaining prior to this motion for summary judgment." Wells Fargo filed its reply on May 19.⁴ The opposition was not actually filed until May 20 and the trial court continued the hearing to allow itself

³ Plaintiff and her daughter share a common surname. So as to avoid confusion, we will use the daughter's first name and references to Catalina are to Catalina Chesley. We intend no disrespect by this practice.

⁴ In her opening brief, Chesley appears to request judicial notice of Wells Fargo's reply in support of the summary judgment motion, her opposition brief, and the "Court file." However, this request is a verbatim copy from her section 473 motion, in which she filed a request for judicial notice, and thus appears to be mistakenly copied. If Chesley intended to make a request for judicial notice in her appeal, it is denied for failure to file a separate motion as required by California Rules of Court, rule 8.252. Finally, we note that her opposition brief is included in the record on appeal.

sufficient time to review and address the motion on its merits, including consideration of the timely served but late filed opposition.

Catalina's declaration states that, on or about May 23, she became "extremely concerned that attorney Cliff had done nothing towards opposing" the summary judgment motion. Catalina was "shocked to learn" that Cliff had not presented the Wells Fargo documents they discussed to the trial court and contacted another attorney. She informed Cliff that she was going to "start filing documents myself in the courthouse," but Cliff tried to dissuade her from doing to.

After further continuances on the trial court's own motion, the final hearing date was set for August 9, 2016. On August 8, the trial court issued a tentative ruling granting Wells Fargo's summary judgment motion, which was not contested by any party. That same day, Catalina filed a purported opposition to the motion in the form of a letter with attached documents produced by Wells Fargo that Catalina "felt the court should have considered" in ruling on the summary judgment motion. Counsel for Wells Fargo did not receive these documents until after the summary judgment hearing. On August 9, Chesley appeared in court without counsel and the trial court continued the hearing to August 16 and ordered Cliff to personally appear.

August 15 proved to be an active day for filings in this action. Wells Fargo filed an ex parte application for reconsideration of the order continuing the summary judgment hearing, arguing it should not have been continued as Chesley failed to contest the tentative ruling. It also filed an ex parte application to strike the documents filed by Catalina on August 8. Meanwhile, Catalina filed a motion to continue the summary judgment hearing pursuant to section 437c, subdivision (h), on the grounds that Chesley had been harmed by Cliff's "lack of performance" and that she had additional evidence to present. Finally, Cliff filed a motion to be relieved as counsel because "the client insists upon protecting a claim or defense that is not warranted under existing law"; "[t]he client by other conduct renders it unreasonably difficult for the attorney to carry out the employment effectively"; the client breached the agreement as to expenses or fees; the

“[a]ttorney has attempted to obtain substitution by mutual consent but client refuses”; and counsel’s elderly father was recently admitted to the hospital.

The motion for summary judgment was heard as scheduled on August 16, 2016. Counsel for Wells Fargo, Chesley, and Catalina appeared at the hearing; Cliff did not. At the conclusion of the hearing, the trial court adopted its August 8 tentative ruling granting Wells Fargo’s motion for summary judgment and denying Chesley’s request for continuance to take depositions; it also granted Wells Fargo’s application to strike the documents filed by Catalina on August 8. In addition, the trial court denied Chesley’s ex parte application to continue the hearing and denied Wells Fargo’s application for reconsideration of the August 8 order to continue the hearing. That same day, the trial court denied Cliff’s ex parte application to shorten time on her motion be relieved as counsel and on August 17 vacated the hearing on her application. On August 18, the trial court entered judgment in favor of Wells Fargo.

On April 10, 2017, Chesley and her new counsel, Donald Charles Schwartz, filed a substitution of attorney form (signed on August 29, 2016) with the trial court.

Chesley’s Motion to Set Aside Judgment under Section 473

On January 26, 2017, more than five months after entry of judgment, Chesley filed a motion for discretionary relief from the judgment under section 473 (the motion).⁵ Along with the notice of motion, Chesley filed a memorandum of point and authorities, a request for judicial notice, and Catalina’s declaration. Chesley did not file a proposed new summary judgment opposition or separate statement. Wells Fargo filed a timely opposition.

The motion was heard on May 16, 2017. The next day, the trial court issued a detailed order finding that Chesley failed to act with diligence by waiting five months to bring the motion; failed to file a proposed memorandum of points and authorities in opposition to the summary judgment motion or otherwise demonstrate how the

⁵ Both mandatory and discretionary relief are available under section 473(b). Chesley only sought discretionary relief.

documents submitted by Catalina on August 8 would have made a difference in the outcome of the summary judgment motion; and failed to demonstrate a valid basis for relief under section 473. Therefore, the motion was denied.

Chesley filed an appeal on July 17, 2017, which Wells Fargo sought to have dismissed as untimely. The motion to dismiss was granted, in part, as to the judgment entered on August 18, 2016, but denied as to the May 17, 2017 order denying Chesley's motion to set aside judgment. On September 8, 2017, Chesley filed a corrected notice of appeal identifying the motion to set aside judgment as the appealable order. Chesley filed her opening brief, and Wells Fargo filed an opposition. Despite four granted requests for extensions of time, Chesley has not filed a reply brief. We further note that Chesley filed an untimely request for oral argument on February 24, 2019 and was promptly instructed by a court clerk to file a request for late filing. As no request for late filing of a request for oral argument has been received, we proceed on the pleadings and the record. (See Ct. App., First Dist., Internal Practices and Proc., III B(3), Oral Argument and Submission of the Cause.)

DISCUSSION

I. Chesley Waived an Appeal of the Trial Court's Determinations that the Motion to Set Aside Judgment was Untimely and that she Failed to Provide the Requisite Proposed Pleading

The trial court's denial of Chesley's motion to set aside the judgment was based on three independent grounds: (1) Chesley failed to act with diligence; (2) Chesley failed to file proposed pleadings in opposition to the summary judgment motion; and (3) Chesley failed to demonstrate a valid basis for relief under section 473. On appeal, Chesley does not provide *any* argument or authority in response to the trial court's findings that she failed to act with diligence in bringing the section 473 motion and that she failed to attach the proposed pleading as required by section 473 or otherwise

demonstrate how a different opposition would have altered the outcome of the summary judgment motion.⁶

“ ‘Issues not raised in an appellant’s brief are deemed waived or abandoned.’ ” (*Davies v. Sallie Mae, Inc.* (2008) 168 Cal.App.4th 1086, 1096 (*Davies*); see also *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 [appeal of dismissal of a cause of action waived where the opening brief did not include specific arguments or supporting authority].) However, even if these arguments had not been waived, it is clear that the trial court did not abuse its discretion. We review its order, in its entirety including waived arguments, for abuse of discretion and affirm for the reasons set forth below.

II. The Trial Court Did Not Abuse its Discretion in Denying the Motion to Set Aside the Judgment

Chesley contends the trial court erred in not granting her relief under the discretionary prong of section 473(b), which provides: “[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.”

“ ‘A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.’ ” (*Zamora v. Clayborn Contracting Group, Inc. (Zamora)* (2002) 28 Cal.4th 249, 257.) “The standard for appellate review of an order denying a motion to set aside under section 473 is quite limited. A ruling on such a motion rests within the sound discretion of the trial court, and will not be disturbed on appeal in the absence of a clear showing of abuse of discretion, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice. Where a trial court has discretionary power to decide an issue, an appellate court is not

⁶ We note that, with the exception of new headings and party descriptions and the addition of a few sentences, Chesley’s argument section of her brief is simply a copy of her motion to set aside judgment.

authorized to substitute its judgment of the correct result for the decision of the trial court.” (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118.)

While section 473 is construed liberally to further the policy of adjudicating legal controversies on the merits (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 66), the trial court had ample, independent grounds to deny Chesley’s motion to set aside the judgment under section 473 and thus did not abuse its discretion.

A. The Motion to Set Aside the Judgment Was Untimely

Section 473(b) requires that any application for discretionary relief “be made *within a reasonable time*, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.” (§ 473, subd. (b), italics added.) Further, a moving party has the burden to “show *diligence* in making the motion after discovery of the default.” (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625 (*Kendall*) (italics in original.))

“[W]hat is a reasonable time in any case depends upon the circumstances of that particular case” (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 528 (*Benjamin*)), and “[w]hether a party has acted diligently is a factual question for the trial court.” (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420.) “A delay is unreasonable as a matter of law . . . when it exceeds three months and there is no evidence to explain the delay.” (*Minick v. City of Petaluma*, 3 Cal.App.5th 15, 34 (*Minick*) (citing *Benjamin*, *supra*, 31 Cal.2d at p. 523); see also *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1184 [stating that the “three-month unofficial ‘standard’ ” established in *Benjamin* “remains true today”].)

Chesley argues that she is entitled to relief from the judgment on the basis of “attorney abandonment,” contending that “despite hiring counsel, [she] did not get the benefit of a proper and substantive opposition to [Wells Fargo’s] motion for summary judgment.” Chesley offers no explanation as to why she could not have raised this issue shortly after judgment was entered. Instead, she focuses on counsel’s failure to include relevant documents in opposition to the motion for summary judgment. As she had those documents in hand at the time of judgment, this cannot provide an explanation for a delay

in filing the section 473 motion. In fact, the only mention of actions taken after the entry of judgment is Chesley's statement that she brought the section 473 motion "after extensive research revealing the criminal conviction of the RWW principle" without any explanation as to how an alleged conviction of a RWW principle relates to the summary judgment motion.

Not surprisingly, the trial court found the delay "unreasonable and inadequately explained," stating that "while this motion may have been brought within 6 months of the ruling on the motion for summary judgment dated August 16, 2016, there is no explanation why it took Chesley an additional 5 months until January 26, 2017, to bring this motion especially if it was about the late-filed evidence that Chesley already had in her possession, which the court had rejected to consider in deciding the motion for summary judgment." The trial court pointed out that Chesley also demonstrated a lack of diligence by failing to file a Code of Civil Procedure section 1008 motion for reconsideration within ten days of the ruling on the motion for summary judgment: "[Chesley] could have brought a timely motion for reconsideration attaching the late discovered evidence and failed to [do so]."⁷

It is clear that the trial court did not abuse its discretion in finding that Chesley's motion was not "made within a reasonable time" as required by section 473(b) as, without explanation, the delay far exceeded the three-month standard set forth by the California Supreme Court. (See *Benjamin*, *supra*, 31 Cal.2d at p. 523.) In addition, our review of the record does not reveal any basis for such a delay.

B. Chesley Fails to Demonstrate a Cognizable Claim for Relief

Had the motion been timely, the trial court did not abuse its discretion in finding that it failed on its merits.

⁷ Under section 1008, subdivision (a), any party affected by a court order "may, within 10 days after service upon the party of written notice of the entry of order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order."

Chesley contends that she is entitled to relief from the judgment because “the actions (and inactions) of attorney Julie Cliff amount to attorney abandonment and prevented [Chesley] from having a meaningful opportunity to challenge [Wells Fargo’s] motion for summary judgment.” She makes the following contentions regarding Cliff’s “abandonment” of her as a client: (1) she “did not meaningfully prepare an opposition” to the motion for summary judgment; (2) she failed to timely file the opposition; (3) the opposition “was so poorly prepared that respondent Wells Fargo actually joked about it in its reply”; and (4) despite the fact that the trial court granted Cliff’s continuance of the motion for summary judgment, “she did not prepare any further opposition” and instead filed a motion to withdraw the day before the summary judgment hearing.

In general, a party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable “because the negligence of the attorney . . . is imputed to his client and may not be offered by the latter as a basis for relief.” (*Buckert v. Briggs* (1971) 15 Cal.App.3d 296, 301 (*Buckert*).) A client’s redress for inexcusable neglect by counsel is, of course, an action for malpractice. (*Martin v. Cook* (1977) 68 Cal.App.3d 799, 809.) “In determining whether the attorney’s mistake or inadvertence was excusable ‘the court inquires whether “a reasonably prudent *person* under the same or similar circumstances” might have made the same error.’ [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error ‘fairly imputable to the client, i.e., mistakes anyone could have made.’ [Citation.] ‘Conduct falling below the professional standard of care, such as failure to timely object or properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.’ ” (*Zamora, supra*, 28 Cal.4th at p. 258.)

Chesley offers no evidence that Cliff’s actions were excusable and therefore subject to discretionary relief. Rather, she argues the attorney abandonment exception to the general rule that attorney mistake or inadvertence must be excusable under section 473. The exception is limited to “those instances where the attorney’s neglect is of that

extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence. [Citations omitted.] The exception is premised upon the concept the attorney's conduct, in effect, *obliterates the existence of the attorney-client relationship*, and for this reason his negligence should not be imputed to the client." (Italics added.) (*Buckert, supra*, 15 Cal.App.3d 296, 301.) The issue, thus, becomes whether counsel's conduct amounted to "positive misconduct" by which Chesley was "effectually and unknowingly deprived of representation." (*Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 391.) Simply put, what the cases finding abandonment under section 473 have in common is a total failure of counsel to represent the client. ([attorney's unexplained "failure to appear at successive pretrial conferences . . . failure to communicate with court, client and other counsel . . . holding the substitution of attorneys for more than five months while his client's cause ripened for disaster . . . refusal to get on with the lawsuit or get out of it" constituted "neglect [that] was inexcusable and extreme" thus sufficient to constitute attorney abandonment] (*Ibid.*); see also *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 353 [the courts have developed an exception to the rule that inexcusable neglect is not usually a proper basis to grant a section 473 motion where the attorney's neglect is so extreme that it operates to "impair or destroy the client's cause of action or defense"].) Thus, inexcusable attorney conduct falling short of total abandonment is not a basis for discretionary relief under section 473(b).

In this case, a substantive opposition including a memorandum of points and authorities, declarations, and a separate statement was filed. While it was timely served but late filed, it was considered on its merits by the trial court. Hence, Chesley has presented no evidence of "total abandonment" by Cliff. (See *Minick, supra*, 3 Cal.App.5th at p. 28, fn.4 [" 'Abandonment' may afford a basis for relief, at least where the client is relatively free of fault, but performance which is merely inadequate will not For the exception to apply, the attorney's misconduct must be sufficiently gross to effectively abrogate the attorney-client relationship"].) Further, while Cliff did not appear at the summary judgment hearing, the trial court noted at the hearing that Cliff's

motion to withdraw as counsel included “that the client is insisting on protecting a claim or defense that’s not warranted under existing law.”

As the record falls far short of demonstrating that Cliff engaged in “positive misconduct” that resulted in her total abandonment of Chesley as a client. (*Buckert, supra*, 15 Cal.App.3d 296), the trial court did not abuse its discretion in finding that Chesley failed to state a viable basis for discretionary relief under section 473.

C. Chesley Failed to Provide the Requisite Proposed Pleading

Section 473(b) requires a moving party to attach the proposed new pleadings to be filed if judgment were set aside: “Application for this relief *shall* be accompanied by a copy of the answer or other pleading proposed to be filed therein, *otherwise the application shall not be granted . . .*” (Italics added.) (See *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1730 [court noted the moving party’s failure to attach the proposed pleading their motion, “as section 473 plainly requires” was one of several factors in concluding the trial court had not abused its discretion in denying relief].)

In *Austin*, the court pointed out that several courts have held that “substantial compliance” with the attached pleading requirement is sufficient because “ ‘the plain objective of the provision . . . was simply to require the delinquent party seeking leave to contest on the merits, to show his good faith and readiness to at once file his [pleading] in the event leave is granted by producing a copy of the proposed [pleading] for the inspection of his adversary and the court.’ ” (*Austin v. Los Angeles Unified School District* (2016) 244 Cal.App.4th 918, 933.) There, the court held that the plaintiff, who had filed other pleadings with the trial court providing her arguments and evidence, had substantially complied even though she failed to file the proposed opposition to a motion for summary judgment. (*Ibid.*) The court explained that the opposition “would have proffered essentially the same factual contentions and legal arguments as she did in her various filings requesting relief from the judgment Accordingly, the objective of the attached-pleading requirement to determine ‘the relief sought is not simply to delay the proceedings’ and the party is acting in good faith had been satisfied.” (*Ibid.*)

Unlike in *Austin*, Chesley did not provide the trial court with the new factual or legal bases on which she would oppose summary judgment. Although she refers to a “proposed Opposition to the Motion for Summary Judgment” in her section 473 motion notice, she did not file a proposed opposition with her motion. Further, in her section 473 motion, she makes the conclusory statement that Cliff failed to file the “Well’s fraudulent scheme documents” that Catalina submitted to the trial court on August 8, 2016, but Chelsey did not identify the specific documents or explain how they could defeat Wells Fargo’s summary judgment motion. In its order, the trial court stated that Chesley “still has not sufficiently explained why [the] late-filed evidence would have made a difference in the outcome of the summary judgment motion, and plaintiff fails to file even a proposed memorandum of points and authorities in opposition to the summary judgment along with a proposed separate statement in opposition, which is required by [section] 473(b).” “Without a proposed memorandum of points and authorities in opposition to the summary judgment along with a proposed separate statement in opposition, the court cannot understand the significance of the late-filed evidence.” At the hearing, counsel for Chesley also argued that RWW, the entity that purchased Chesley’s property, was “operated by a felon” and was part of an “illegal scheme.” The trial court found this argument “was not helpful in showing Wells Fargo was involved in the alleged ‘fraudulent scheme’ that caused plaintiff to lose her home.”

We find the trial court did not abuse its discretion in ruling that Chesley was neither in actual nor “substantial” compliance with section 473(b) as Chesley did not provide to the trial court – or on appeal – a cognizable explanation as to how the late-filed documents she has identified, or an “illegal scheme” involving RWW, would have changed the ruling on the motion for summary judgment.

DISPOSITION

The judgment is affirmed. Wells Fargo is entitled to recover its costs on appeal.

Petrou, J.

WE CONCUR:

Siggins, P.J.

Fujisaki, J.

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